In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 965

ANTONIO MARQUES-ARBONA,
PETITIONER,

v.

SECRETARY OF THE TREASURY
OF PUERTO RICO,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Blanchard Printing Company, Boston, Mass. — Law Printers

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

COUNTER STATEMENT OF QUESTION

Whether under section 60 of the 1924 Income Tax Act of Puerto Rico, 13 L.P.R.A. sec. 778, a waiver of the assessment and collection of taxes due under a return made for an alleged calendar year applies to that calendar year, or if the taxpayer is in reality on the fiscal year basis, to the fiscal year ending in the calendar year named in the waiver.

OPINION BELOW

A translation of the opinion of the Superior Court of Puerto Rico appears printed as Appendix A of the petition at pages 16-26.

A translated copy of the opinion of the Supreme Court of Puerto Rico, which is not yet officially reported, appears printed as Appendix B of the petition at pages 27-32.

LACK OF JURISDICTION

This Hon. Court has no jurisdiction to entertain the instant petition under 28 U.S.C. sec. 1258, since it does not appear alleged, in same, expressly or by necessary implication, any of the situations therein expressly and specifically stated. See sub-sec. (3), wherein is required that the validity of a treaty or statute of the United States be drawn in question, or that the validity of a statute of the Commonwealth of Puerto Rico be at issue on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or that any title, right, privilege, or immunity be specially set up or claimed under the Constitution, treaties, or statutes of, or commission held, or authority exercised under the United States.

Jurisdiction in cases of review of a state court by this Honorable Court is limited to specific instances of denials of federal rights and only in cases strictly within the terms of the statute granting the power to do so. *Gonman v. Washington University*, 316 U.S. 98 (1942); *Waters Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

The only issues involved in the instant case is the interpretation of a local statute by the Supreme Court of Puerto Rico, and the Supreme Court of the United States does not re-examine the local law as applied by local courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

STATUTES INVOLVED

The pertinent statutes are the following:

28 U. S. C., Sec. 1258
Act No. 74 of 1924, as amended by Act No. 31 of 1941 (13 L.P.R.A. 778).

COUNTER STATEMENT OF THE CASE

The petitioner, in determining his taxable income for each of the years herein involved used a twelve-months period beginning July 1 and ending June 30 of the following year.

Notwithstanding the fact that he had to pay taxes on the basis of said fiscal period ending June 30, he filed his returns stating in the heading of same that they covered the calendar year ending December 31, although those returns included no operations or income of the six months period immediately preceding December 31. Moreover he filed said returns on March 15 of the respective subsequent year instead of on September 15 of the same year in which each fiscal year ended, as required by law.

Pending investigation, and before the expiration of the statute of limitations, petitioner signed, at the request of respondent, waivers of the prescription and assessment of any income taxes due for each year herein at issue. In each of said waivers respondent typed December 31 as the date on which the taxable period covered ended, and December 31, 1954 as the expiration date of the extension agreed for the assessment of any deficiency. (Petition—Appendix A page 22).

The deficiencies were notified by respondent to petitioner on August 17, 1954. (Petition—Appendix A—page 16).

The taxpayer filed suit in the Superior Court of Puerto

Rico challenging said deficiencies, alleging that the above mentioned waivers were ineffective since they referred to calendar years ending December 31 and the deficiencies notified had been determined on the basis of fiscal years ending June 30. (Petition—Appendix B—page 28).

The Superior Court of Puerto Rico originally decided the issue of prescription against petitioner. (Petition—Appendix A—pages 16-26).

The Supreme Court of Puerto Rico reversed the judgment rendered by the Superior Court in favor of petitioner on the issue of prescription, and upheld also the penalties assessed. (Petition—Appendix B—pages 27-32).

ONLY QUESTION PRESENTED

As hereinbefore stated the only question presented by the taxpayer in the courts below, and in the above petition, refers to the effectiveness of the above mentioned waivers, since the right of respondent to assess and collect the deficiencies herein involved depends on that issue.

The pertinent facts and the applicable law and cases are clearly stated in the opinion of the Supreme Court of Puerto Rico (Petition—Appendix B) and we fail to find any justification to indulge in any further discussion of same.

The taxpayer, after stating the reasons on which he requests the granting of the writ, alleges at page 11 of his petition, the following:

> "Under these circumstances there are two issues: (1) Could the Secretary of the Treasury, respondent herein, change petitioner's system of filing his returns to December 31 and notify him with a deficiency on the basis of a different year, in violation of the period specified in the waiver of prescription authorizing him to investigate only petitioner's calendar years?" And

(2). Could the Secretary of the Treasury, respondent herein, utilize semesters corresponding to years that had definitively prescribed in order to compose therewith a fiscal year and assess a deficiency, as well as interest, surcharges, and fines for a delay in filing the return, when such delay was caused by respondent in connection with the petitioner?"

He seems to fail to distinguish, as to the first one of said statements, that the controlling fact is not the date stated in the heading of the return filed by him as covering a calendar year ending December 31, but the fact that in reality he determined his taxable income on the fiscal year basis ending June 30, since what respondent did was to disregard the fiction and act on the basis of what petitioner did in reality. Likewise, as to the second statement, he seems to consider that a taxable year consists of two separate and independent semesters for the purpose of determining taxable income, and that one semester of any fiscal year may be severed and tacked to the second semester of the immediately subsequent calendar year. (13 I.P.R.A. 771(a)(1)).

The delay in filing the returns was due to the fault of petitioner, since he ignored the real facts and the law.

The cases cited by petitioner are not applicable to the issue involved. In *Commissioner of Internal Revenue v. Leasing & Building Co.*, 46 F.2d 2 (1931) the returns were filed upon the basis that the taxpayer's annual accounting period was in reality the calendar year, and the commissioner determined that they should have been filed on the fiscal year basis. The waiver referred to the calendar year. In said case the decision of the Board of Tax Appeals, 16 B.T.A. 105 (1929), was affirmed. The issue in *Mabel Elevator Co.*, 2 B.T.A. 517 (1925) was whether the filing of an amended return extended the term for assessment of the

tax. The Commissioner insisted that the return should have been filed on the calendar year and not on the fiscal year basis. No waiver was involved.

PRAYER

WHEREFORE, respondent prays that the petition for a writ of certiorari be denied.

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